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Supreme Court, U.S.
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NO. A-55

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

AARON VENCE & DENISE YOUNG
PETITIONERS

VS.

BOLIVAR COUNTY COMMUNITY ACTION PROGRAM, INC.,
THE BOARD OF DIRECTORS OF BOLIVAR COUNTY
COMMUNITY ACTION PROGRAM, INC., being
CLYDE AYCOCK, JERRY HOLLINGSWORTH,
WESLEY J. LIDDELL, SAM D. LONG, E. L. McMURCHY, JR.,
THOMAS MORRIS, WILLARD SAMUELS, JIM SCOTT,
KIRKHAM POVALL, TOMMY NARON, ALLEN DENNIS,
JOE ANDERSON, WILLIE B. SMITH, also RICHARD GERNERT,
JO ANN ANDERSON, BILLY JOE McCAIN, JOHN L. JORDAN,
and OTIS R. BOWEN, SECRETARY OF THE DEPARTMENT
OF HEALTH & HUMAN SERVICES
RESPONDENTS

PETITION FOR CERTIORARI: from the COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI - 5th AMENDMENT,
42 USC SECTION 1983 and MANDAMUS CLAIMS

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QUESTIONS PRESENTED

I.

Whether it was error to grant Defendants' Motions for Summary Judgement and to Dismiss the Fifth Amendment claim when a reasonable juror could have found the responsible HHS official provided significant, covert encouragement to the Bolivar CAP Director to fire Mr. Vence over the disapproval of the Policy Council.

II.

Whether it was error to grant Defendant's Motions for Summary Judgement and to Dismiss when the responsible HHS official owed Mr. Vence and Miss Young the duties of: not advising Bolivar CAP to violate the regulations, enforcing the original Policy Council decision reinstating Mr. Vence and holding the Show Cause

Hearing in compliance with the regulations.

III.

Whether it was error for the District Court to never rule on Petitioner's FRCP 56(f) Opposition to the Non-Federal Defendants' Motion for Summary Judgement when continuing discovery problems existed.

IV.

Whether 28 USC s 1920 (2) requires that a defeated plaintiff always is required to pay the costs of his deposition even when it is not used in any substantial sense by either the Court or the prevailing party.

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Bolivar Headstart Standard Operating Procedure #18
Roberts Rules of Order

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1987

Aaron Vence and Denise Young

Petitioners

v.

Bolivar County Community Action Program, Inc., The Board of Directors of Bolivar County Community Action Program, Inc., being Clyde Aycock, Jerry Hollingsworth, Wesley J. Liddell, Sam D. Long, E.L. McMurchy, Jr., Thomas Morris, Willard Samuels, Jim Scott, Kirkham Povall, Tommy Naron, Allen Dennis, Joe Anderson, Willie Anderson, Billy Joe McCain, John L. Jordan and Otis R. Bowen, Secretary of the Department of Health and Human Services

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Aaron Vence and Denise Young, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 20, 1987.

Opinions Below

The opinion of the HHS Hearing Officer is unreported and is printed in Appendix "A" hereto, page . The opinion of the United States District Court for the Northern District of Mississippi Delta Division is unreported and is printed in Appendix "A" hereto, page . The Order of the United States District Court for the Northern District of Mississippi Delta

Division, dismissing Petitioners' Complaint is unreported and is printed in Appendix "A" hereto, page . The Opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court is unreported and is printed in Appendix "A" hereto, page .

Jurisdictional Grounds in This Court

The Judgement for the United States Court of Appeals for the Fifth Circuit (Appendix "A", page) was entered on April 20, 1987. The jurisdiction of the Court is invoked under 28 USC §§ 1254 (1).

Constitutional and Statutory Provisions

The Constitutional Provisions at issue here is the Fifth Amendment

to the Constitution of the United States. The statutory provisions are 42 USC § 1983, 5 USC § 702, 28 USC § 1361, 42 USC § 9837, 42 USC § 9833, 28 USC § 1920 (2). Since they are too lengthy to be set out here, they are printed in Appendix "A" at pps.

Statement of the Case

This is an action by Petitioner Aaron Vence, who served as the administrative assistant at Bolivar County, Mississippi Head Start for eighteen (18) years against Respondents Billy Joe McCain, the program director, the Board of Directors of Bolivar County Community Action Program (hereinafter Bolivar CAP) which was designated to administer Bolivar

Headstart by the Bolivar County Board of Supervisors and the Department of Health and Human Services, Richard Gernert, the Executive Director of Bolivar CAP, and Jo Ann Anderson, chairman of the Headstart Policy Council, a parents' group required by the statute and regulations, for injunctive relief and damages to redress his termination from his position by the foregoing defendants in violation of the Fifth Amendment to the United States Constitution and 42 USC §§ 1983. This is also an action by Aaron Vence against Respondents Dr. Otis R. Bowen, Secretary of the Department of Health and Human Services (hereinafter HHS) and John L. Jordan, the HHS employee

charged with overseeing Bolivar Headstart, for injunctive relief ordering them to enforce the original Policy Council Decision reinstating him under the Fifth Amendment and for a Writ of Mandamus also ordering them to enforce the original Policy Council Decision reinstating him pursuant to 5 USC § 702. Finally it is an action by Petitioner Denise Young who was a duly elected Policy Council Member when the complained of events happened, against Respondents Dr. Bowen and Mr. Jordan for a Writ of Mandamus to vindicate her vote to reinstate Mr. Vence pursuant to 5 USC § 702 (Rpps. 1-18). Miss Young was originally joined by two (2) other Policy Council members, Reverend Charles Williams and Beverly

Perkins who have since withdrawn grom the case (Rpp. 347-349, Principal Brief p.26).

Aaron Vence had served well for eighteen (18) years as the administrative assistant to Billy Joe McCain, Director of Bolivar County Headstart (Rpp. 2, 269, 369). However, in March of 1983, Mr. Vence was very outspoken at a meeting of Headstart workers where the topic was Mr. McCain's alleged misuse of program funds (Rpp 5, 269,371). Within three (3) months, on June 17, 1983, Mr. Vence was accused by Mr. McCain of filing local travel statements when he had not actually performed the travel (Rpp. 5, 269, 372). The basis of this

accusation was Mr. Vence having inadvertently misdated a travel statement for a day when he was in Dallas, Texas. However, he had made the travel, just not on the date in question (Rpp. 269-270). Mr. McCain was never able to produce any other conclusive proof of this allegation.

Then on July 8, 1983, Mr. McCain sent Mr. Vence another letter accusing him of receiving duplicate travel payments from the National Headstart Staff Association while Mr. Vence was a Board member of said association and not notifying the Headstart Program (Rpp. 5, 270,372). Mr. Vence had earlier told Mr. McCain he was receiving these payments which, anyway, did not duplicate the

travel payments Mr. Vence had received from Bolivar Headstart (Rpp. 5,270,372, 336-337). The National Headstart Staff Association was very disorganized in reimbursiing Board members and only did so at sporadic intervals. Often, Mr. Vence would receive reimbursement at subsequent meeting for his travel to a previous meeting. Other times the NHSSA Board Meeting would occur in the same location immediately before the NHSSA Convention. When that happened, Mr. Vence would receive some funds from NHSSA to attend the Board Meeting and the other funds from Bolivar Headstart to attend the Convention (Rpp. 147-270). Mr. McCain never did establish this

action that Mr. Vence knowingly received duplicate travel payments from NHSSA and Bolivar Headstart to attend the same meeting.

On September 29, 1983, Mr. McCain sent Mr. Vence a letter suspending Mr. Vence without pay pending termination for "deliberate falsification of records and misappropriation of program funds" (Rpp 5-6, 147, 270, 273). Pursuant to the HHS regulations governing Headstart programs and Bolivar Headstart's own Standard Operating Procedures, Mr. Vence appealed his suspension to the Headstart Policy Council (Rpp. 6, 147, 270, 273). The Policy Council is a parents' group which

exists to fulfill the statutory mandate of 42 USC § 9837(b): "In order to be so designated, a Headstart agency must also (1) establish effective procedures by which parents and area residents concerned will be enabled to directly participate in decisions that influence the character of programs affecting their interests; (2) provide for their regular participation in the implementation of such programs..." and 42 USC § 9833 which requires that, in order to be provided financial assistance by HHS, a Headstart Agency must "... provide for direct participation of the parents of such children in the development, conduct, and overall program direction at the local

level." The HHS regulations setting out the structure and functions of Policy Councils are found at 45 CFR Appendix "B", Chart C. Under the regulations, Policy Councils must approve or disapprove the firing of Headstart Staff. The Headstart Staff and the CAP Executive Director had general responsibility. The CAP Board "may be consulted". Under the regulations this means that the CAP Board <u>may</u> be called upon for information, advice, or recommendations by those individuals having general or operating responsibility. The Regulations state that where a group that must approve the firing does not approve it, the step cannot be taken until

agreement is reached between the disagreeing groups or individuals. In this case that should mean agreement between the Policy Council, Mr. McCain and Mr. Gernert, not between the Policy Council and CAP Board - which only "may be consulted" and has no decision making power to this instance.

Further, Paragraph C Functions found at p. 660 of 45 CFR states; re: Policy Councils: "The following paragraphs and charts describe the minimum functions and decrees of responsibility for various policy groups involved in administration of locat Headstart Programs. Local groups may negotiate for additional functions and a greater share of responsibility if all parties agree...

(emphasis in original).

In this case, Bolivar Headstart had adopted the following Standard Operating Procedure #18, which under the Regulations had to have been approved by the Executive Director, which was also approved by the CAP Board, and which Mr. McCain had operating responsibility for:

I. General: The procedure established by this instruction is to assure that all employees will be given due process in contesting adverse personnel actions such as firing... An appeal is filed directly with the Headstart Policy Council...

II. Procedure: ... Unless

appealed to the CAA Board on procedural due process ground, the decision of the Policy Council is the final step on the program level ..." (Rpp. 274-275).

On November 9, 1983, Mr. Vence received a thorough hearing of the charges against him before the Policy Council Grievance Appeal Committee.

The decision of the Committee was that Mr. Vence should not be fired but should be reinstated with back pay. (Rpp. 6, 147, 270, 373). On December 7, 1983, after another thorough hearing, the full Policy Council upheld the Committee's decision and also voted that Mr. Vence should be reinstated with back pay (Rpp. 6, 147, 270, 373). Petitioner Denise Young was one of

the Policy Council members voting to reinstate Mr. Vence. Mr. Vence did not appeal the Policy Council decision to the CAP Board. However, on December 8, 1983, Mr. Gernert refused to reinstate Mr. Vence on the grounds that the Policy Council's decision represented "gross irresponsibility and disregard of the agency's personnel Policies and Procedures." He then ordered Mr. Vence to appear before the CAP Board, even though Mr. Vence had not appealed the Policy Council's decision (Rpp. 6, 271,171(27), 251, 259, 271, 373). One-third (1/3) of the CAP Board's members are appointed by the Bolivar County Board of Supervisors, which also designated Bolivar CAP to administer

Headstart and which pays 1/3 of Bolivar CAP's office rent (Rpp. 4,371,390).

It took the CAP Board two (2) meetings to achieve a quorum to consider Mr. Vence's termination. There was no quorum at the first meeting and the only reason there was a quorum at the second meeting on January 3, 1984 is because the Chairman, Kirk Povall, begged another member to stay rather than attending a basketball game and another to stay rather than attend a City Council meeting. After speedily considering the matter, the CAP Board voted to terminate Mr. Vence (Rpp. 6,148,167(3), 255, 271, 373, 434-435).

At some point after this meeting, Mr. Gernert spoke with John Jordan, the HHS regional official, in Atlanta, Georgia who oversees Bolivar County Headstart and who must decide whether or not Bolivar CAP is complying with the Federal regulations governing Headstart programs. Mr. Gernert testified at his deposition and subsequently stated in his Answer to Plaintiff's Requests for Admissions that he explained to Mr. Jordan the CAP Board's approval of the decision to terminate Mr. Vence and the Policy Council's disapproval of it. Mr. Gernert then asked Mr. Jordan what would be the proper procedural way to do this. Mr. Gernert states that Mr. Jordan advised him to go ahead and

terminate Mr. Vence, and give him pay up to that point, and let Mr. Vence appeal his termination to HHS (Rpp. 257-258, 390-391, 420, 482, 271-272, 148). Mr. Jordan has denied this (Rpp. 276-324). Mr. Gernert stated in his deposition that he decided to follow Mr. Jordan's advice to disobey the regulation rather than obeying the regulation because "this would be quicker" (Rp.482) After Mr. Vence's termination, the CAP Board then refused to meet with the Policy Council to try and reach an agreement (Rp. 167(4)).

Mr. Vence then appealed his termination to HHS (Rpp. 148, 271). Mr. Jordan ordered Bolivar CAP to reinstate Mr. Vence or funding

would be terminated (Rpp. 171(11) - 171(12), 250). When not surprisingly, Bolivar CAP refused, (Rpp. 167(10), 256 Mr. Jordan ordered that a show cause hearing be held on the matter in Atlanta on April 17, 1984 (Rpp. 171(21), 251).

Although Mr. Jordan and the Hearing Officer both referred to it as an "Informal Show Cause Hearing", the regulation allowing such at 45 CFR §§ 1303.37 was not complied with because the written consent of Bolivar CAP to an "Informal Show Cause Hearing" required by the Regulation does not appear in the Hearing record and, in fact, was never given (Rpp. 171(21), 251, 167(15), 257). Therefore, the regulations which

govern show cause hearings should have been complied with and they were not. First, although Mr. Vence requested that he be allowed to participate in the Hearing, he was not allowed to and was not given a statement of the reasons why not contrary to 45 CFR 1303.35(f) (Rpp. 171(18), 251, 171(20)). Second, no record was made of the Hearing, contrary to 45 CFR §§ 1303.35 and, in fact, the tape recording of the Hearing was erased. (Rp. 253). Third, none of the documents submitted by Bolivar CAP was submitted to Mr. Vence or his attorneys, and in fact, documents which Mr. Vence had never been given were submitted to HHS. (Hearing Officer's Opinion p. 11).

The only record Mr. Vence or his attorney ever received of the Show Cause Hearing was the Hearing Officer's Notes which were produced by HHS on March 21, 1986, in obedience to the District Court's Order entered on March 19, 1986 granting Mr. Vence and Miss Young's Motion to Compel said Hearing Notes (Rpp. 4110413). The Notes do not indicate that termination of funding was ever considered as an Option. The end of the Notes states:

"Saddler (n.b. the HHS Official at the Hearing):

'We are sympathetic'

1) Demotion, suspension

2) My time frame." (Rpp. 438-440)

The Hearing Officer found that Mr. Vence had been terminated

without Policy Council approval, and he also notes that Bolivar CAP's rationale for doing so is that they are held accountable by the Government for the proper administration of grant funds. He then recommended the matter be remanded so that the CAP Board and Policy Council could meet to resolve their difference (Rpp. 171(22)-171(33), 251). On May 17, 1984, Mr. Jordan adopted the Hearing Officer's decision and ordered that the Policy Council and CAP Board meet to resolve their differences (Rpp. 171(34), 171(35), 251).

During this time, Mr. McCain, through the Headstart fiscal Officer, Adolph Hillard, hired seven (7) members of the Policy Council,

including the Chairperson, Jo Ann Anderson, to work on the Summer Feeding Program held at the Headstart facilities during the summer (Rpp. 8, 375-376). On May 31, 1984, Mrs. Anderson called a special meeting of the Policy Council. The notice of the meeting did not state the Police would entertain a motion to rescind its previous disapproval of Mr. Vence's termination (Rpp. 8-9, 376). Also seven (7) of the members present had never heard Mr. Vence present his side of the story (Rp. 376). In spite of that, Mrs. Anderson refused to allow Mr. Vence to speak (Rp. 149, 272). She then entertained a Motion to rescind the Policy Council's former decision.

It passed by a vote of 16 to 8 with one abstention - (Rpp. 9, 376). The Policy Council at that time numbered approximately 45 voting members. Therefore this vote was contrary to Robert's Rules of Order which state that if a week's notice is not given of a Motion to Rescind then a two-thirds majority of the entire body is needed to rescind the decision.

On June 19, 1984, the Policy Council met again. Again Mr. Vence was not allowed to make a presentation and again the notice of the meeting did not state that a Motion to Rescind would be considered. Immediately after that meeting the Policy Council met with the CAP Board which merely approved the Policy Council's decision to rescind

its former decision (Rpp. 9, 267(1)-167(2), 255, 377).

Mr. Vence then appealed the Policy Council's decision to the CAP Board, then to HHS, both of which ruled against him. Having exhausted his administrative remedies, on January 22, 1985, he began this action in the United States District Court for the Northern District of Mississippi (Rpp. 1-18). In addition to Mr. Vence and Miss Young, Beverly Perkins and Reverend Charles Williams, members of the Policy Council who voted in favor of his reinstatement, were also Plaintiffs in the Mandamus cause of action. However, Reverend Williams was later allowed to drop as a Plaintiff by the Court and Mr.

Perkins declined to join in the appeal to the Fifth Circuit. Therefore, only Mr. Vence and Miss Young remain as Petitioners.

After issue was joined, Petitioners conducted extensive discovery including the depositions of Billy Joe McCain, Jo Ann Anderson, Richard Gernert and Adolph Hilliard by non-stenographic means (Rpp. 59-60, 61, 63-64). The Defendants also deposed Mr. Vence by traditional means (Rpp. 57-58). On September 26, 1985 the Non-Federal Defendants served their Motion for Summary Judgement. The ground for the Motion germane to this Petition was that Bolivar CAP was not a state or federal instrumentality subject to the

EDITOR'S NOTE

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constraints of the First, Fifth, or Fourteenth Amendments (Rpp. 65-67).

On October 15, 1985, Petitioners filed their opposition to the Motion for Summary Judgement under FRCP 56(f) which Opposition stated that while a Community Action Agency would be subject to suit under the Fifth Amendment and 42 USC ss 1983 if the jurisdictional prerequisites were met, that Petitioners, although having diligently pursued discovery, were presently unable to present by Affidavit essential facts to justify their opposition to the Motion for Summary Judgement (Rpp. 68-70). In support of their Opposition, Petitioners attached the affidavits of Aaron Vence,

Pamela Childs, Bill Wilson and their attorney, Nancy Pace Kossman to establish the technical problems that Petitioners had been having transcribing the taped deposition of Billy Joe McCain. Attached to Mrs. Kossman's Affidavit was all the discovery conducted by Petitioners up to that point in the case (Rpp. 147-171(49)). After the Summary Judgement Motion and Opposition thereto were filed, Petitioners continued to seek discovery from the non-federal defendants pending the District Court's ruling on the matter. However, on December 17, 1985, Petitioners filed their Motion to extend the discovery deadline, Motion deadline and continue the pretrial conference. The basis

for this Motion germane to this discussion was that Petitioners had been unable to conduct further discovery from the non-federal defendants because of the pending Motion for Summary Judgement and Petitioners' FRCP 56(f) Opposition thereto (Rpp. 240-242). On December 18, 1985, the Court's Order was entered extending the Motions and Discovery deadlines to February 15, 1986, but refusing to continue the Pretrial Conference on the grounds that pendency of a Motion for Summary Judgement was no justification for postponing the Pretrial Conference or failing to proceed with discovery (Rpp. 242-244). Faced with this Order, Petitioners then served further discovery on

the non-federal defendants.

On February 1 (sic), 1986, the federal defendants filed their Motion to Dismiss on the grounds that Bolivar CAP was not a federal instrumentality, which Motion was supported by an Affidavit from John Jordan (Rpp. 276-324).

Shortly before the end of the discovery period, Nancy Kossman then Attorney for Petitioners called Wayne Drinkwater, Attorney for the Non-federal Defendants to set up a time to depose the members of the CAP Board to find out (1) Who they were appointed by, (2) whether they were present at the hearing on his termination and (3) how they voted on Mr. Vence's termination. Mr. Drinkwater agreed to provide the

requested information voluntarily if his clients were not deposed (Rpp. 473, 474). However, after the expiration of the discovery period, he refused to so saying the requested information did not relate to his Motion for Summary Judgement.

When the District Court heard oral argument on the Defendants Motions for Summary Judgement and to Dismiss on March 27, 1986, this problem was brought to the attention of the District Court by Mrs. Kossman as further precluding Summary Judgement under FRCP 56(f) (Rpp. Vol. III 36, 38). Also at oral Argument, Petitioners argued that the Motion should be denied under FRCP 56(f) because Richard Gernert

had not yet signed his Deposition, even though the transcript and the tape thereof had been provided to Mr. Drinkwater on February 28, 1986, (Rpp. Vol. III 41-42) and because Attorneys for Plaintiffs should be allowed further discovery into the show cause hearing, the Notes of which were only provided to them on March 21, 1986 pursuant to the Court's Order compelling discovery.

On April 8, 1986, the District Court's Memorandum Opinion was filed granting both Motions of all Defendants and dismissing the case (Rpp. 449-459). Also on April 8, 1986, pursuant to that Opinion, an Order was entered dismissing the case (Rpp. 460). In its Opinion the District Court found that, even if Mr. Jordan did advise

Mr. Gernert to terminate Mr. Vence over Policy Council disapproval, Petitioners did not establish that Mr. Jordan retained power and authority over Bolivar CAP personnel matters or that Mr. Jordan in some way compelled or directed the ensuing course of action taken by Mr. Gernert. The District Court essentially sidestepped Petitioner's claim that Mr. Jordan's conduct of the hearing in violation of the regulations or subsequent remand constituted federal action by finding that HHS had no authority to hear Mr. Vence's substantive claims.

Regarding Mr. Vence's §§ 1983 claim, the District Court held that the two-pronged test of Lugar v.

Edmondson Oil Co., 457U.S. 922 (1982) had not been met, because Mr. Vence could not show that the deprivation of his rights resulted from a state rule, policy or decision. Finally regarding Mr. Vence and Miss Young's claim for Mandamus, the District Court denied it because it found that the remand was in accordance with HHS Regulations and that HHS had no duty to enforce Bolivar Headstart S.O.P. #18. The Court's Opinion did not discuss Petitioners Rule 56(f) Opposition to the Motion for Summary Judgement.

On April 18, 1986, Mr. Vence and Miss Young served their Rule 59(e) Motion to Alter or Amend the Judgement (Rpp. 466-506). It was denied on May 23, 1986 (Rpp. 513).

On April 21, 1986, the Non-federal Defendants filed their Bill of Costs for $810.00 for Aaron Vence's Deposition. The Bill did not specify whether it was only for the original or included copies (Rp. 507). On May 21, 1986, Mr. Vence and Miss Young's Motion to disallow the taxation of the costs was filed (Rpp. 510-512). On June 21, 1986, an order signed by the District Clerk was entered denying the Motion to disallow costs (Rp. 514).

On July 22, 1986, Mr. Vence and Miss Young filed their Notice of Appeal to the United States Court of Appeals for the Fifth Circuit (Rp. 515). The case was placed on the Summary Calendar and on April

20, 1987, the Fifth Circuit's Opinion affirming the District Court was rendered. In the Principal and Reply Briefs, Mr. Vence had argued that the specific conduct he claimed as violating his rights under the Fifth Amendment was Mr. Gernert's termination of him over the disapproval of the Policy Council. In its opinion, the Fifth Circuit did not deal with this argument, but rather focused in whether Mr. Jordan had influenced, encouraged or compelled Mr. Germert's original decision to terminate Mr. Vence. The Fifth Circuit found no connection between the original decision to terminate Mr. Vence and Mr. Jordan. Also the Fifth Circuit found that Mr. Jordan subsequently holding the

show cause hearing and remanding the case to Bolivar CAP did not constitute federal action for the purpose of encouraging or influencing Mr. Vence's termination. Regarding Mr. Vence and Miss Young's claim for Mandamus, Court of Appeals agreed with the District Court that HHS had no duty to enforce S.O.P. #18. Regarding their claim that Summary Judgement was inappropriate because discovery was incomplete, the Fifth Circuit did not deal with Mr. Vence and Miss Young's argument that Mr. Drinkwater's refusal to produce the information he had promised precluded Summary Judgement under FRCP 56(f) and simply said that enough time had elapsed since the Motion for Summary Judgement for Mr. Vence and Miss Young to have completed discovery. Finally the Fifth Circuit refused to overturn

the taxation of the deposition for reasons that are not entirely clear and held that the burden was on Mr. Vence and Miss Young to show that copies were made of the deposition, a burden that they had not met. With regard to Mr. Vence's 42USC ss 1983 claim, the Fifth Circuit held that Mr. Vence had abandoned it by not fully briefing it. This was in spite of the fact that a good part of the discussion of their Rule 56(f) Opposition was based on their need for the withheld information to establish state action under 42 USC ss 1983.

On July 16, 1987, Mr. Vence and Miss Young served their Application to Extend Time to file Petition for Writ of Certiorari. It was granted by order of this Court dated July

17, 1987 and they were given until August 18, 1987 to file this Petition for Writ of Certiorari.

Jurisdictional Grounds in the District Court

The District Court had jurisdiction of the original action herein under the Fifth Amendment because Bolivar CAP acted as a federal instrumentality in terminating Mr. Vence over the Policy Council's disapproval, and under 28 USC §§ 1331 (a), 1343(3), and (4) and 1361. The amount in controversy exceeded $10,000.00.

Argument

This is a case where this Court should grant a Writ of Certiorari with regard to Mr. Vence's Fifth Amendment claim because the Fifth

Circuit decided the question in a way that is in conflict with this Court's decisions in Blum v. Yavetsky 457 U.S. 991, 73 LEd2d 534, 102 S.Ct. 2777 (1982) and Anderson v. Liberty Lobby, Inc. U.S. 91 LEd2d202, 106S.Ct. 2505 (1986). Regarding Mr. Vence and Miss Young's other claims: that the District Court should have denied the Motion for Summary Judgement under FRCP 56(f), granted them Mandamus because John Jordan breached his duties not to violate the regulations and to enforce Bolivar Headstart S.O.P #18 and should not have taxed the costs of Mr. Vence's deposition against them, this Court should grant Certiorari because these issues present important questions

of federal law which have not been, but should be, settled by this Court.

I.

Last term this Court articulated the appropriate standard for granting or denying a Motion for Summary Judgement in Anderson v. Liberty Lobby, Inc., U.S., 91 LEd2d202, 106 S.Ct. 2505 (1986). This standard is "...summary judgement will not lie if the dispute about a material fact is "genuine". That is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., supra at p. U.S. 91 LED2d202, 106 S.Ct. 2505 (1986). In Public

Utilities Commission v. Pollak 343 U.S. 451, 72 S.Ct. 813(1952), this Court articulated the following test for a finding of Fifth Amendment action: "When authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by the Government itself." Public Utilities v. Pollak, supra, at 343 U.S. p. 462 f.n. 8, 72 S. Ct. p.820 f.n.8. More recently, this Court articulated the proper standard for a finding of State action under 42 USC § 1983 in Blum v. Yaretsky, supra at 457 U.S. p. 1004, 73 LEd2d p. 546, 102 S.Ct. p. :" The purpose of this requirement [i.e. nexus] is

to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the Plaintiff complains... a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be in law be deemed to be that of the State." (emphasis added).

It is respectfully submitted that, under current Fifth Circuit Court of Appeals precedent, the foregoing test has been held to be valid in determining whether Federal action is present under the Fifth Amendment. Miller v. Hartwood Apartments, Ltd. 689 F.2d 1294 (5th Cir. 1982).

Mr. Vence's Fifth Amendment claim sets forth facts that could justify reasonable jurors in finding that Mr. Vence was fired by Mr. Gernert over Policy Council disapproval, in violation of the statute and regulations, because Mr. Gernert was told by Mr. Jordan, the federal official charged with upholding the regulation and holding Mr. Gernert accountable for violating it, that this would be the "proper" thing to do. Reasonable jurors could further find that, when Mr. Vence appealed the firing to HHS, Mr. Jordan deliberately manipulated the appeal, all the while violating the applicable regulations and contrary to the statutory directive that there be direct, effective parent participation in program decisions in

in such a way that Mr. Vence had no further chance to contest the end of his career. Further reasonable jurors could find that Bolivar CAP was not penalized in any manner for violating the regulation Mr. Jordan had encouraged them to violate in the first place. It is respectfully submitted that if reasonable jurors found the above facts to be true, that they would find that Mr. Jordan had provided such significant covert encouragement to Mr. Gernert to fire Mr. Vence over Policy Council disapproval (the specific action complained of), that they would have the power to return a verdict for Mr. Vence on his Fifth Amendment claim.

The main problem with both the District Court's and the Fifth Circuit's Opinions herein is that they do not make inferences from these facts most favorable to Mr. Vence but rather resolve them against Mr. Vence. In both Opinions it is stated that Mr. Jordan's threat to terminate Bolivar CAP's finding obliterates any argument Mr. Vence might have that Mr. Jordan encouraged his termination over the Policy Council's disapproval. Dear Reader, please ask yourself, is it not possible for even an employee of the United States Government to announce that he means to do one thing when he means to do quite another? According to the District Court and the Fifth Circuit it <u>is</u> impossible.

I maintain, when put to the reasonable juror, it would be found to be not only possible, but in this case, probable, especially when one considers that the Show Cause Hearing did not comply with the Regulations, that Bolivar CAP's funding was never terminated, and that Mr. Vence ended up as terminated as terminated can be, with Mr. Jordan's thumb firmly on the scales tilting the balance towards Bolivar CAP.

The word "justice" does not appear in U.S. Supreme Court Rule #17, and yet, surely, it must permeate this Court's deliberations on whether or not to hear a case of Writ of Certiorari. Therefore, apart from the foregoing argument that

tnis federal question was decided in conflict with the aforecited decisions of this Court, it can only finally be argued that if the unwarranted and summary disposition of this meritorious case is allowed to stand, then Justice does not appear, and has not been served, in this case.

II.

In seeking Mandamus under 5 USC § 702, Mr. Vence and Miss Young have claimed that Mr. Jordan owed them three (3) duties: (1) to not advise Mr. Gernert to violate the regulations; (2) Enforce the original Policy Council decision under Bolivar Headstart S.O.P. #18 and (3) to hold the Show Cause Hearing in a manner that complied with the applicable regulations.

both the District Court and the Fifth Circuit only dealt with Mr. Jordan's duty to enforce the original Policy Council decision under Bolivar Headstart S.O.P. #18. Both Courts refused to address the other two (2) duties alleged in their opinions.

It is clear that Mr. Jordan had a duty to conduct the Show Cause Hearing in a manner that complied with the regulations. Workman v. Mitchell 502 F.2d 1201 (9th Cir. 1974). Further, Petitioners argue the lower Courts erred in finding no duty to enforce Bolivar Headstart S.O.P #18 because the statute requires direct, effective parent participation in program decisions and the regulations allow a Policy

Council to negotiate for and receive greater authority if all parties agree (which they appear to have done). Therefore, Mr. Jordan had a duty to enforce S.O.P. #18 which required that the original Policy Council decision be enforced, because its adoption was in accordance with the Regulations and fulfilled the statutory directive of direct, effective parent participation in Program decisions. Petitioners maintain that forcing agreement between the Policy Council and CAP Board in this instance sabotaged the statutory directive. However, the third duty cited by Petitioners represents the important question of Federal law which has not been, but should be,

settled by this Court: to wit, does a federal official have an enforceable duty to not advise others to violate federal regulations? It would seem almost self evident that this is so, since any other conclusion would undermine the rule of law which must exist hand in hand with the federal government. It is respectfully submitted that this case provides an excellent opportunity for this Court to make it clear that not only must federal officials obey the law and regulations themselves, they are prohibited from counseling others to violate them. For that reason a Writ of Certiorari should be issued to review this question.

III.

Another important question of federal law that has not been settled by this Court, but can be in this case, is what exactly should be the District Court do when a Motion for Summary Judgement is opposed under FRCP 56(f)? Of course, FRCP(f) sets out the following possible actions. "...The Court may refuse the application for judgement or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is Just." However, in this case, Petitioners were placed in dilemma where, after they filed affidavits stating why they could not present by affidavit facts essential to justify their

their opposition, the Court took none of the above described actions.

At first, trying to avoid a Motion for a Protective Order, Petitioners did not conduct any further discovery against the Non-federal defendants while waiting until the Court had ruled on their FRCP 56(f) Opposition, a ruling which was never made. Then, after the Magistrate refused to re-set the Pretrial Conference on the grounds that pendency of a Motion for Summary Judgement was no justification for failing to proceed with discovery, Petitioners once again began to seek discovery from the non-federal Defendants. At the hearing on the Motion for Summary Judgement, Attorney for Petitioners once again urged the

Court that further discovery was necessary because of Mr. Drinkwater's breaking his promise to provide the requested information about the Board members, Mr. Gernert's failure to sign the transcription of his deposition and HHS only providing the Hearing Officer's Notes compelled by the Court on March 22, 1986, after the discovery period had expired. However, the District Court did not anywhere address Petitioner's Rule 56(f) Opposition in its Opinion granting Summary Judgement to all the Defendants.

Petitioners then raised these contentions again in their Motion under Rule 59(e) to Alter and for Vacate the judgement, claiming that the Court should vacate its

grant of Summary Judgement to allow these problems to be resolved. Again, the District Court simply denied the Motion without discussion. These points were raised yet again in Petitioners' Principal Brief as an Error. The Fifth Circuit dealt with this issue not by analyzing the points raised but by counting how many months elapsed between the filing of the lawsuit and stating: "Appellants therefore had ample time to conduct discovery."

This case gives this Court an opportunity to require lower Courts to make an Order of this type specified in FRCP 56(f) when the non-moving party opposes Summary Judgement on the grounds that discovery is not completed. It is respectfully submitted that, for

the Court to make such a ruling would end the uncertainty experienced by litigants who, as in this case, must oppose Summary Judgement under FRCP 56(f) but are given no guidance by the Court on the matter and must either await the Court's ruling and suffer because they failed to conduct further discovery or conduct further discovery under peril of the moving party filing a Motion for a Protective Order. To leave this question unresolved does nothing to secure the "just, speedy and inexpensive determination of every action." FRCP 1., whereas to resolve it would serve those praiseworth purposes of the Federal Rules of Civil Procedure.

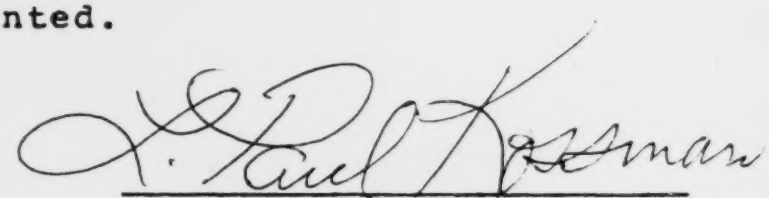
IV.

Finally, Mr. Vence's Deposition costs are reached. This Court has never decided whether the language of 28 USC §§ 1920(2) allowing as costs: "all or any part of the stenographic transcript necessarily obtained for use in the case" requires that the deposition of a party plaintiff even though not used in any substantial sense will always be taxable as costs. Especially where, as here, it was never even made part of the record. It is respectfully submitted that this is not required by the statute and that, in this case, the District Court Clerk abused his discretion in granting these costs and the Fifth Circuit erred in

upholding the Order. While Deposition costs may not be an earthshattering issue, still, the expense of taking stenographic depositions, and the threat of having to pay for them if one loses are a crucial consideration for any person of modest means who must resort to the federal Courts to protect his or her rights. Therefore it is respectfully argued that for the Court to grant a Writ of Certiorari to resolve this issue, and to resolve it in Petitioners' favor would also aid in the "inexpensive" determination of every action.

Conclusion

WHEREFORE, based on the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.



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Supreme Court, U.S.
FILED
AUG 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. A-55

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

AARON VENCE & DENISE YOUNG
PETITIONERS

VS.

BOLIVAR COUNTY COMMUNITY ACTION PROGRAM, INC., THE BOARD OF DIRECTORS OF BOLIVAR COUNTY COMMUNITY ACTION PROGRAM, INC., being CLYDE AYCOCK, JERRY HOLLINGSWORTH, WESLEY J. LIDDELL, SAM D. LONG, E. L. McMURCHY, JR., THOMAS MORRIS, WILLARD SAMUELS, JIM SCOTT, KIRKHAM POVALL, TOMMY NARON, ALLEN DENNIS, JOE ANDERSON, WILLIE B. SMITH, also RICHARD GERNERT, JO ANN ANDERSON, BILLY JOE McCAIN, JOHN L. JORDAN, and OTIS R. BOWEN, SECRETARY OF THE DEPARTMENT OF HEALTH & HUMAN SERVICES
RESPONDENTS

PETITION FOR CERTIORARI: from the COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI - 5th AMENDMENT, 42 USC SECTION 1983 and MANDAMUS CLAIMS

ACCOMPANYING APPENDIX TO PETITION

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May 11, 1984

RECOMMENDATION CONCERNING PROPOSED TERMINATION OF HEAD START FEDERAL FINANCIAL ASSISTANCE TO BOLIVAR COUNTY COMMUNITY ACTION PROGRAM, INC.

INTRODUCTION

On April 17, 1984, pursuant to 45 C.F.R. § 1303.37, an "informal" show cause hearing was conducted by the undersigned for the purpose of rendering a recommendation as to whether the above-referenced Head Start grantee should be terminated for violating 45 C.F.R. Part 1304, Appendix B (70.2). The violation alleged is the grantee's termination of the

employment of a Head Start staffer (Mr. Aaron Vence) without the approval of the Policy Council.

Representing the Administration for Children Youth and Families (hereinafter "ACYF") at the hearing were: Mr. William Saddler, Chief of the Head Start Division, Mrs. Bessie Barnett, Supervisor for Mississippi, Ms. Beverly Taylor, Child Development Program Specialist and Mrs. Dana Petti, Assistant Regional Attorney.

Representing the grantee at the hearing were: Mr. Kirk Povall, Attorney and Chairman of the Board of Directors, Bolivar County Community Action Program (hereinafter "BCCAP"), Mr. Richard Gernert, Executive Director of the Community Action Program, Mr. Billy Joe McCain,

Head Start Program Director, and Mr. Adolph Hilliard, Finance Officer of the Head Start program. Also present were Mrs. Jo Ann Anderson, Chairperson of the Policy Council and Mr. Willie Simmons, advisory member of the Policy Council.

Over fifty documents were submitted by the parties at the hearing. These documents are composed of grantee Board of Director meeting minutes, Policy Council meeting minutes, correspondence between the grantee and the Policy Council, correspondence between the grantee and Mr. Vence and/or his attorney, correspondence between the grantee and SCYF and correspondence between Mr. Vence's attorney and ACYF. Also included in these documents

are grantee personnel policies and procedures, various travel expense statements and other miscellaneous letters and records. All of these are forwarded along with this recommendation, and, to the degree possible, are arranged in chronological order.

A statement of facts, deemed to be pertinent by the undersigned is set forth below:

STATEMENT OF FACTS

On June 17, 1983, the Head Start Program Director, Mr. Billy J. McCain forwarded a letter to Mr. Aaron Vence, Head Start Administrative Assistant, which set forth allegations concerning the filing of "bogus" local travel statements for payment. On July 8, 1983,

Mr. McCain forwarded another letter to Mr. Vence stating that the recently received documents indicated that on four out-of-town trips Mr. Vence had "received payment from the staff association [National Head Start Association] and program for attending the same meeting." An explanation ". . . for the duplication of the above travel expense payments" was requested.

Mr. Vence responded on August 2, 1983, by submitting an accounting of his trips to National Board Meetings between February 1979 and February 1983. ". . . and I have spent approximately $4,000 of my personal money to represent Bolivar County Head Start and the State Staff Association on the national

level for the past four years. I have gone far beyond the call of duty as a staff memeber [sic] without proper compensation and recognition."

On September 16, 1983, Mr. McCain continued his correspondence with Mr. Vence. After reviewing Mr. Vence's explanation and other pertinent documents, it was Mr. McCain's conclusion that "duplication of travel payments" had occurred on four occasions between 1980 and 1982. Mr. McCain informed Mr. Vence that in submitting travel expense statements,

> ... you have neglected to indicate reimbursements received from the National Staff Association for the same trip. Nor have you at any time advised this program that you received reimbursement for travel from any

source. Therefore, the travel expense statements submitted by you are fraudulently documented which resulted in duplication of payments to you.

Thereafter, a special meeting of the Executive Board of the Policy Council and Board of Directors were held on September 27, 1983. Mr. McCain stated he had requested the meeting "because there were some discrepancies in the Head Start Program which involved finance records." Mr. McCain presented the allegations of travel expense abuse concerning Mr. Vence, as generally outlined above. Documents were reviewed and questions were asked by various Board members. It was pointed out that Mr. Vence had signed out-of-town travel expense statements containing the following

certification: "I certify that this statement, the amounts claimed and attachments are true, correct and complete to the best of my knowledge and belief, and no payment for the amount claimed, other than the advance indicated above has been received." The Board concluded the grantee's Personnel Policies and Procedures called for the dismissal of Mr. Vence.

On September 29, 1983, Mr. McCain informed Mr. Vence that his handling of out-of-town travel expenses violated the agency's fiscal policies and his actions constituted ". . . deliberate falsification of records and misappropriation of program funds." Accordingly, Mr. Vence was notified of his suspension, without pay, pending termination

procedures. Appeal procedures were set forth in this letter.

On October 13, 1983, Mr. Vence, through his attorney, appealed the adverse personnel action in a letter to the chairperson of the Policy Council. Mr. Vence stated that the personnel action was taken because he represented a dissatisfied group of the staffers and "Mr. McCain wants to destroy leadership of the dissatisfied staff." Mr. Vence also stated that the charges of local and out-of-town travel abuse were without foundation and requested a hearing in order to refute the charges.

A hearing before the Grievance/ Appeal committee of the Policy Council was held on November 9, 1983. Apparently a hearing could

not have been held any sooner because a new Policy Council (consisting of 31 new members) had been formed in early October and committee memberships and training had not yet been established. (See October 18, 1983 letter of Mrs. Jo Ann Anderson to Mr. Aaron Vence). Seventeen committee members were present at the grievance hearing. 1/

Mr. McCain, Mr. Vence, and his attorney, Mr. Kossman, were all present and addressed the issues concerning alleged travel expense abuses. Mr. Vence generally denied the charges of local travel abuse and claimed that the allegations

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1/ At this time the Policy Council was composed of a total of 41 persons.

were unsubstantiated because no sign-in sheets existed which could verify the allegations. Mr. McCain countered with examples of three instances of abuse which he claimed were verifiable. In regard to out-of-town travel, Mr. Vence denied that he deliberately falsified records and misappropriated funds. Furthermore, he stated that he had spent $2,000 to $3,000 of his own money to attend meetings around the country and that Mr. McCain had presented "incomplete information" to the policy meeting group. After questions from various committee members, the committee went into executive session.

During the executive session, various committee members commented on the situation presented. One member

emphasized that in regard to the four instances of dual payments received for out-of-town travel, Mr. Vence had stated "Monies received on several of those four meetings were in excess of expense occurred." Another stated that, "a man's job is at stake . . . and he has a family to support" and consequently he should not be terminated. Additionally, a comment was made that "Mr. Vence has been caught with his hands in the pie and there are probably some staff involved in the same thing." When the issue came to a vote, nine voted to reinstate and three voted not to reinstate. The committee's final recommendation to the Policy Council was for reinstatement with back pay.

On December 7, 1983, an executive

session of the Policy Council was convened to consider the Grievance Committee's recommendation concerning Mr. Vence. One council member asked if the Policy Council would be liable if it reinstated Mr. Vence even if his actions had in fact violated the grantee's personnel policies. There apprently was lengthy discussion of this issue. Another council member stated that if Mr. Vence was fired, the Project Director and Chief Fiscal Officer should also be terminated because there was "no way in the world these things could have been going on and they did not know anything about it." A third member stated that there was "no direct documentation that said you could not get partial payment . . ." When a vote

was taken 18 voted to reinstate and 7 voted against reinstatement. Mr. Richard Gernert, BCCAP's Executive Director, responded to the Policy Council's decision on December 8, 1983 by stating that the action represented "gross irresponsibility and disregard of the agency's Personnel Policies and Procedures." Accordingly, since the CAA Board of Directors had legal, fiscal and overall administrative responsibilities in the operation of the Head Start Program, he directed that reinstatement not be carried out until the Board considered the matter further.

Thereafter, a special meeting of the BCCAP Board of Directors was held on January 3, 1984 to consider the

personnel matter involving Mr. Vence. 2/ Mr. Vence and his attorney appeared and made presentations, as did Mr. McCain. Documents were also presented to the Board. Mr. McCain stated that the Program, from time to time, had agreed to pay for some out-of-town trips but he had been unaware that Mr. Vence was receiving additional payments from the National Association for some of the trips. Mr. Vence and his attorney then proceeded to present a detailed explanation of their view of the local and out-of-town travel expense abuse allegations. Mr. Vence stated that on

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2/ Apparently, the Board met on December 14, 1983 to consider this issue, but a quorum was not present.

numerous occasions he had used personal funds when travelling and that he had "indicated to the Project Director and Fiscal Officer that partial payments were being received from the NHSSA." Mr. Vence is also reported as having "refuted" charges that he had received funds from both organizations for the same trip. Mr. Adolph Hilliard, the Fiscal Officer, countered by stating that Mr. Vence had declared in staff meetings that he was not receiving funds from other sources and that minutes from a March 3, 1983 meeting reflected this statement. The Board then met in executive session and after considering all statements and documents concluded that the termination was correct and justified.

On January 6, 1984, the chairman of

the BCCAP Board of Directors informed Mr. Vence that the Board had voted to uphold his termination. The chairman further stated that he would invite the Policy Council to resolve the disagreement with the Board.

The Policy Council next met on January 17, 1984. During an executive session, the Council chairperson stated that the Council and Board should attempt to reach an agreement concerning the Vence matter. Seventeen of the twenty-two present Council members voted to hear a presentation from the grantee's Board chairman, Mr. Povall. Mr. Povall then proceeded to address the Council and reviewed the four out-of-town trips at issue. Several Council members asked questions of

Mr. Povall and discussions among Council members ensued. The meeting concluded with the Policy Council voting to extend an invitation to Mr. Vence to appear before it. This was then to be followed by an attempt to meet with the BCCAP Board in order "to see if there can be any clarification between the Board and Council." The Council, however, did not at that time rescind or disavow its decision to reinstate Mr. Vence.

On January 19, 1984, the Board wrote a letter to Mr. John Jordan, Regional Program Director for ACYF and set forth the procedural history of the subject personnel matter and the Board's position. Mr. Povall, writing for the Board, stated that "an impasse continues to exist insofar as the proposed action . . ."

The letter also indicated that the Board would welcome the Government's assistance in resolving the matter.

Four days later, on January 23, 1984, the chairperson of the Policy Council indicated in a letter to Mr. Povall that on January 17, 1984, the Council had voted "to hear the case again before the full Policy Council" in early February, 1984. If agreement with the Board's action could not be reached at that meeting, the Council would then request a meeting with the entire Board of Directors on February 7, 1984 "in an effort to resolve the differences between the Policy Council's decision and the Board's decision."

On January 25, 1984, the Executive Director of BCCAP, Mr. Gernert,

wrote Mr. Vence. Mr. Gernert noted that the Policy Council had voted to rehear the case but went on to declare, "I fear that to prolong a final decision in a matter of such serious nature can only jeopardize the well being of the program." Accordingly, Mr. Vence was informed that he would be terminated effective January 27, 1984, if he did not immediately resign. Because the suspension had been pending for an inordinate period of time, Mr. Vence was paid his regular salary for the period between September 30, 1983 and January 27, 1984, minus $1,084.49, which sum was viewed as duplicate travel payments by the grantee.

On January 27, 1984, Mr. Vence's attorney informed Mr. Gernert that Mr. Vence was planning to appear at

the February 1, 1984 Policy Council meeting. Thereafter, on January 31, 1984, the attorney, Mr. Kossman, wrote to Mr. John Jordan of ACYF claiming that Mr. Vence's due process rights had been violated by the matter in which his appeal procedure had been handled. Mr. Kossman also argued that the evidence against his client was insufficient to support the charges. In regard to the out-of-town travel issue, it was stated that,

> Mr. Vence insists Mr. McCain knew for quite sometime that Mr. Vence was obtaining partial reimbursements from the local program . . . Suddenly Mr. McCain says he never knew about NHSA reimbursals . . . Mr. Vence is in possession of a tape where his voice is recorded explaining to the aministrative staff of Head Start that he received partial reimbursement from the NHSA and partial reimbursement from the local program. Mr. Vence states

> that Mr. McCain is circulating a bogus set of minutes where it is stated Mr. Vence denied receiving NHSA funds . . ..

The letter concluded with a demand that Mr. Vence be reinstated with back pay.

Next, on February 1, 1984, Mr. Povall informed the chairperson of the Policy Council that the requested meeting between the Council and the Board was no longer necessary in light of the January 27, 1984 termination and the referral of the matter to the ACYF. Accordingly, the Board declined to meet with the Council.

On February 15, 1984, Mr. John Jordan of ACYF wrote the BCCAP Board of Directors stating that he had received correspondence concern-

ing the Vence matter. He indicated, however, the ACYF could not "measure the merits" of the dispute and that the Board was required to adhere to the requirements set forth in 45 C.F.R. Part 1304, Appendix B (70.2). Mr. Jordan called for the reinstatement of Mr. Vence in light of the fact that the Policy Council had not approved the termination.

On February 24, 1984, the grantee admitted in a letter to Mr. Jordan that Mr. Vence had been terminated without the approval of the Policy Council. However, the grantee requested a show cause hearing in order to demonstrate that the termination was justified under the facts and circumstances.

On April 2, 1984, ACYF informed

BCCAP of its intent to terminate financial assistance and set forth April 17, 1984 as the date for an informal show cause hearing in Atlanta.

STANDARD OF REVIEW

The undersigned has considered all the statements made at the hearing and has reviewed all of the documents submitted.

The record clearly demonstrates that Mr. Aaron Vence, Head Start Administrative Assistant, was terminated by BCCAP without the approval of the Policy Council. The grantee, both at the hearing and in correspondence, admits that 45 C.F.R. Part 1304, Appendix B (70.2) has not been followed. The grantee contends, however, that since the allegations against Mr. Vence concern abuse of

travel funds and submission of false travel expense statements and since the BCCAP Board is held accountable by the Government and to the taxpayers for the proper administration of grant funds, termination of federal financial assistance is not warranted in this case.

The regulation governing termination states that, "The responsible HHS official may terminate financial assistance . . . for failure to comply with any requirement . . . ." (emphasis supplied). 45 C.F.R. § 1303.33(a). The regulation further provides, "If the responsible HHS official believes that alleged noncompliance with any requirement stated in § 1303.30 is serious enough to warrant termination of financial assistance . . . he will so notify

the grantee . . ." (emphasis supplied). 45 C.F.R. § 1303-33(b). It is thus apparent that the undersigned is authorized to exercise his discretion in considering whether the facts presented warrant termination of Head Start funds to grantee.

The undersigned, however, does not believe that it is within his province to decide the merits of the dispute between the Board and Mr. Vence. Nor is it believed that as between the Board and the Policy Council, the undersigned should recommend whose position is correct. Thus, in presenting this recommendation, the undersigned expresses no opinion on the merits of the dispute concerning Mr. Vence, the grantee's Board of Directors and the Policy

Council.

DISCUSSION AND RECOMMENDATION

Public Law 97-35 (95 Stat. 99), August 13, 1981, Subchapter B, Section 638, indicates that Congress expects Head Start programs to "provide for direct participation of the parents . . . in the development, conduct, and overall program direction at the local level." Appendix B of 45 C.F.R. Part 1304 sets forth, in detail, the role of Head Start parents in the overall program. The Head Start Policy Council 3/ has been given at least 17 distinct functions according to

3/ At least 50% of the Council members must be parents. 45 C.F.R. Part 1304, Appendix B, Chart A.

Chart C of Appendix B. Among those is the authority to hire and fire Head Start staff. At the same time, the Head Start Board of Directors, the Executive Director and the Head Start Director are all given specific duties and responsibilities. Significantly, the Board of Directors is legally and fiscally responsible for the administration of program funds. It is noted that structurally, an inherent tension is created when more than one body is charged with the responsibility for personnel and fiscal matters.

Indeed, it appears that ACYF has previously recognized this inherent tension. In March 1980, the Office of Human Development Services issued ACYS/HS/3.01, an Instruction entitled "Board of Directors'

Relationship to Head Start Policy Council." 4/ This Instruction states that when the Board and Council do not agree on an issue, "the Board and the Policy Council representative should meet jointly to resolve the matters confronting the two bodies. In most cases an agreement will be reached. If there is an impasse, the issue may

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4/ At the time of its issuance, apparently a draft regulation was in circulation calling for arbitration when a dispute between these two bodies could not be resolved. However, the proposed regulation was never implemented according to statements made by Mr. William Saddler at the hearing.

be arbitrated through a procedure involving a disinterested third party." 5/ To the best of the undersigned's knowledge, this Instruction has not been materially revised or rescinded.

The record in this matter indicates that the Policy Council and Board members never met jointly in an attempt to resolve their differences. On January 6, 1984, the chairman of the BCCAP Board expressed, on behalf of the Board, a desire to resolve the dispute with the Policy Council. Eleven days later, on January 17,

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5/ Mr. Saddler also stated at the hearing that the Government does not perform as an arbitrator in such a case.

1984, the chairman addressed the Policy Council. At the close of the meeting, Council members voted to afford Mr. Vence an opportunity to present his case before the full Council on February 1, 1984. It was resolved that if the Council did not change its position as a result of this meeting, a meeting with the full Board would be sought on February 7, 1984 "to see if there can be any clarification between the Board and the Council." This intention was repeated in the Policy Council chairperson's January 23, 1984 letter of the chairman of the Board. However, on January 25, 1984, the Executive Director of BCCAP stated that if a final decision was prolonged in the Vence matter, the well being of the

program would be jeopardized. Accordingly, he proceeded to terminate Mr. Vence. In light of the termination, the Board on February 1, 1984, declined to meet with the Policy Council.

The undersigned concludes that all avenues of resolution available within the local Head Start program should be exhausted before question of termination is addressed by the Government. It is therefore recommended that the Board and Policy Council, or representative thereof, meet in joint session for the purpose of attempting to resolve their differences. 6/

6/ Perhaps several meetings will be necessary before it can be ultimately determined whether or not a true impasse exists.

In reviewing the record, the undersigned further notes that apparently neither the Board nor the Policy Council set forth cohesive written statements discussing their respective view of the pertinent facts and the manner in which the facts were weighed and credibility was evaluated. 7/ It is suggested that if each body drafts such a document

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7/ In particular, minutes of the Policy Council meetings do not clearly reflect its thought process and rationale. It is thus difficult to ascertain the degree to which the merits of the dispute were analyzed by the newly formed Council.

prior to the joint meeting, a framework for the constructive interchange of relevant questions and viewpoints will be established.

Furthermore, a January 31, 1984 letter from Mr. Vence's attorney to Mr. Jordan suggests that additional pertinent evidence exists which heretofore has not been presented to the Council or Board. Additionally, at the hearing in Atlanta, the grantee presented, apparently for the first time, local Head Start sign-in sheets which allegedly are in conflict with some of Mr. Vence's out-of-town travel expense statements. It is in the best interest of all concerned that any information having a bearing on the relevant issues be considered at the grantee level.

If the Board and Council cannot reach an agreement or compromise in this matter, it is recommended that arbitration or intervention by a disinterested third party be sought by the Council and the Board. Ultimately, if this matter cannot be resolved at the local level, ACYF will have to decide whether or not the situation justifies termination of financial assistance. A decision to terminate will necessarily impact upon the beneficiaries of the program, the children. A decision not to terminate will impact upon the relations between various components of the Head Start adult community. It is not believed that the disruption or polarization that would result from either decision would be

beneficial to the Head Start

program.

Joel Lerner
Informal Show Cause Hearing Officer
Regional Attorney's Office

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

AARON VENCE, ET AL., Plaintiffs	)	
V.	)	NO. GC85-88-NB-O
BOLIVAR COUNTY COMMUNITY ACTION PROGRAM, INC., ET AL., Defendants	)	

MEMORANDUM OPINION

The plaintiff Aaron Vence brought this wrongful termination of employment action under 42 U.S.C. § 1983, the Fifth Amendment to the United States Constitution and 5 U.S.C. § 702, against the Bolivar County Community Action Program, Inc. (BCCAP), the Board of Directors and its individual members, Margaret Heckler as Secretary of Health and Human Services (HHS), and John Jordan, the regional program director for HHS, for injunctive and damages

relief. Two members of the Bolivar County Head Start Policy Council have joined with Vence in a mandamus action under 5 U.S.C. § 702 in an effort to "vindicate their initial vote" in favor of reinstating Vence to his position as a Head Start employee. Vence also asserts pendent state claims of libel, slander and tortious interference with his employment against defendant, Billy Joe McCain, the Director of the Bolivar County Head Start program. The defendants, John Jordan and Margaret Heckler (as the "federal defendants") have now moved to dismiss the above styled and numbered action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) asserting as a basis the lack of "state action" involved

in the alleged injurious action on the part of BCCAP. For the same reason, the remaining defendants have separately moved for summary judgment. For purposes of judicial economy, the court will address both motions within this opinion.

The facts, viewed in the light most favorable to the plaintiffs as the non-moving parties, are as follows. The plaintiff Aaron Vence was employed for approximately eighteen years as the Assistant Director of the Bolivar County Head Start Program when he received a letter on September 29, 1984 from McCain advising Vence that he was being terminated, effective September 30, 1983, for submitting false travel vouchers to BCCAP. Vence appealed the decision to the

Policy Council Grievance Committee which voted to reinstate Vence. The Policy Council subsequently accepted the committee's recommendation.

On December 8, 1983, the Executive Director of BCCAP, Mr. Richard Gernert wrote the Policy Council to notify them that the Board of Directors would review the Policy Council's decision. Upon review of the charges against Vence on January 3, 1984, the Board voted to terminate his employment. Faced with an impasse between the Policy Council and the Board of Directors, Gernert initiated a telephone conversation with Jordan wherein Gernert requested Jordan's advice as to the "proper procedural way" to terminate Vence and force the

entire issue to HHS. It is alleged that Jordan advised Gernert to follow the Board decision to terminate Vence. On January 25, 1984, Gernert wrote Vence to inform him that his termination would be effective January 27, 1984. On the same date, Gernert advised Jordan by letter of the reasons for the Board action.

Jordan subsequently wrote the Chairman of the Board of Directors of BCCAP, Kirk Povall, stating his view that the Vence termination was in violation of HHS regulations inasmuch as the termination was effected without Policy Council approval. After Povall refused to reinstate Vence, Jordan wrote BCCAP advising that federal funding would be terminated subject to an informal show cause hearing set for April 17,

1984.

Upon the conclusion of the show cause hearing, the hearing officer found that BCCAP violated applicable HHS regulations and recommended that the BCCAP Board and the Policy Council hold a joint meeting in order to resolve the dispute. Jordan accepted the recommendation and remanded the dispute back to BCCAP for resolution.

On May 31, 1984, the Policy Council met and voted to rescind its prior decision to reinstate Vence and then promptly voted to terminate Vence's employment. The impasse now having been resolved by virtue of the Policy Council action, Jordan wrote Povall on July 24, 1984 and stated that HHS regulations had been satisfied.

Vence has brought the present action claiming that his termination was accomplished in violation of applicable BCCAP[1] and HHS

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[1] Bolivar County Head Start Standard Operating Procedure 18.II.7 provides that unless the decision to fire or hire a Head Start employee is appealed to the Community Action Agency Board on procedural due process grounds, the decision of the Policy Council is the final step at the program level.

regulations[2] which govern the role of the Policy Council in decisions to hire or fire Head Start personnel. Violation of the above regulations, it is argued, constituted a deprivation of due process under the fifth and fourteenth amendments. Vence, together with Denise Young and Beverly Perkins, also seeks an order of mandamus pursuant to

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[2]The applicable HHS regulation, 14 C.F.R. § 1304 (App.B) provides that the Policy Council must approve firing decisions before they may become final. If the action is not approved, then the action may not be taken until agreement is reached between the disagreeing groups. HHS interpretation of this regulation requires disagreeing factions to meet jointly to resolve disputes.

5 U.S.C. § 702 on the basis that their vote as Policy Council members to reinstate Vence was nullified by Jordan's decision to remand the dispute back to BCCAP upon the conclusion of the informal show cause hearing. Plaintiffs assert that Jordan's failure to uphold the original Policy Council decision violated BCCAP and HHS regulations.

The defendants have now moved to dismiss and for summary judgment asserting the lack of state or federal action in this case which is a necessary element of plaintiff's constitutional claims. The above motions thus present the issue of whether the actions of BCCAP in terminating Vence without Policy Council approval may be "fairly attributed to the state or federal

government" for the purposes of establishing a claim cognizant under the United States Constitution. See The Civil Rights Cases, 109 U.S. 3, 11 (1883) (fourteenth amendment does not govern private action); Public Utilities Commission v. Pollack, 343 U.S. 451, 461 (1952) (first and fifth amendments apply only to government action). Because this court has considered the evidentiary matter submitted in support of, and in contravention to, the motion to dismiss, both motions now pending will be examined under the standard set forth in Fed. R. Civ. P. 56.

We start first with the general proposition that a state chartered non-profit community action agency, such as BCCAP, although receiving a

substantial portion of its funds from the federal or state government, is not a state or federal instrumentality whose actions are subject to constitutional scrutiny. United States v. Orleans, 425 U.S. 807, 816-17 (1976). Admittedly, however, the above proposition does not foreclose the question of whether state action is present in the case sub judice. Instead, when faced with a suit involving nominally private action wherein it is claimed that the action should be subject to constitutional scrutiny, we must determine whether the state has so far involved itself with the actions of a private individual that it would be reasonable to conclude that the state is in fact responsible for the conduct. As made clear

by the Supreme Court in Blum v. Yaretsky, 457 U.S. 991 (1982), "mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible" but rather it must be shown that the State has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state. Id. at 1004-05. See also, Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 166 (1978). Therefore, as aptly stated in Gilmore v. Salt Lake Community Action Program, 710 F.2d 632, 636 (10th Cir. 1983), the task before this court consists of "distinguishing the exercise of governmental power from benign or

tangential governmental involvement."

We first consider the claim by Vence that the defendants deprived him of his fifth amendment right to due process. It is not claimed by Vence that the requisite federal action can be found in Gernert's "underlying actual decision" to fire him. Rather, it is claimed that Jordan encouraged Gernert to take a procedural step that was in violation of BCCAP and HHS regulations. Gernert's continued insistence that Vence's employment be terminated, it is argued, was directed or caused by Jordan. In support, the plaintiff makes reference to a single telephone call initiated by Gernert wherein Gernert asked Jones for advice on the "proper procedural way" to terminate

Vence so as to enable HHS to hear the dispute. It is claimed by the plaintiff that Jordan advised Gernert to fire Vence regardless of the position taken by the Policy Council. The plaintiff argues that the advice and resulting action violated his procedural rights set forth in the applicable BCCAP and HHS regulations inasmuch as the regulations grant the Policy Council final authority over personnel matters.

The court finds that plaintiff's federal action claim is controlled by Blum v. Yaretsky, 457 U.S. 991 (1983), Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) and Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) and therefore finds that plaintiff has failed to

raise a genuine issue of material fact on the question of whether federal action exists in this case. Assuming that Jordan did advise Gernert to terminate Vence over Policy Council objection, as we must for present purposes, plaintiff has failed to establish that Jordan either retained power or authority over BCCAP personnel matters or that Jordan in some way compelled or directed the ensuing course of action engaged in by Gernert. Further support for the court's finding can be found in Jordan's position, taken subsequent to the phone conversation with Gernert, that termination of federal funds would result if BCCAP failed to reinstate Vence. In short, not only do the facts as presented by

the plaintiff fail to establish the type of coercive power or substantial encouragement necessary for a finding of federal action in this case, the facts also do not support a finding that the federal government approved of or acquiesced in the decision by BCCAP to terminate Vence over Policy Council objection.[3]

The plaintiff also asserts that BCCAP's actions surrounding his

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[3]Furthermore, because HHS does not retain either the authority or power to hear Vence's substantive claims, the court does not find a violation of Vence's fifth amendment due process rights resulting from the failure of HHS to allow Vence to participate during the informal show cause hearing.

termination constituted state action subject to the fourteenth amendment. Although BCCAP is a private non-profit corporation, it is suggested that because one-third of the Board is appointed by state officials the action of the Board is therefore state action. According to language found in Rendell Baker v. Kohn, 457 U.S. 830, 832 (1982) and lower court decisions, see Gilmore v. Salt Lake Community Action Program, 710 F.2d 632, 637 (10th Cir. 1983); Thompson v. Community Action of Greater Wilmington, 567 F.Supp. 1159, 1165-66 (D. Del. 1983), appointment of Board members by public officials is a factor to be considered and may be dispositive on the question of whether an

ostensibly private entity is a state actor. This factor alone, however, is not sufficient to establish state action. As set forth in Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), the finding of state action under the fourteenth amendment requires the satisfaction of a two-prong test:

> First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible . . .. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

457 U.S. at 937. Thus, although plaintiffs' allegations may be said to have satisfied the second prong of Lugar, the first prong remains unaccounted for. In this

case, the plaintiff has failed to show that the alleged deprivations resulted from a state rule, policy or decision. In this regard, the reasoning of the Tenth Circuit Court of Appeals in Gilmore is found to be correct and therefore dispositive. The court thus finds that plaintiff has failed to raise a genuine issue of material fact on the issue of state action under the fourteenth amendment.

Finally, the plaintiffs, Vence, Denise Young and Beverly Perkins, seek an order of mandamus pursuant to 5 U.S.C. § 702 requiring HHS to uphold the initial Policy Council decision to reinstate Vence. Because section 702 does not independently confer subject matter jurisdiction on this court to hear

plaintiff's mandamus action, the plaintiff apparently asserts federal question jurisdiction inasmuch as it is claimed that HHS failed to follow its own regulations by ordering that the dispute be remanded back to BCCAP. The relevant HHS regulation, 45 C.F.R. § 1304 (App. B:"C"), provides that the Policy Council must approve firing decisions before they become final and further provides:

> If [the Policy Council] does not approve, the proposal cannot be adopted, or the proposed action taken, until agreement is reached between the disagreeing groups or individuals.

Health and Human Services interpretation of the above regulation makes clear HHS's policy of encouraging the resolution of internal

disputes at the local level. This policy is consistent with the general advisory relationship HHS has with community action agencies and the fact that HHS has no authority over personnel matters. The court finds that the remand order was in accordance with applicable HHS regulations and that therefore Vence was not denied due process. In addition, Jordan or HHS had no duty to adhere to the BCCAP regulation which plaintiff asserts was violated by virtue of the remand. Accordingly, the court finds a lack of a genuine issue of material fact as to plaintiff's claim for relief under 5 U.S.C. § 702.

Because of the absence of federal question or diversity jurisdiction

existing over the pendent state claims, the court finds that these claims should be dismissed pursuant to United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

Let an order issue accordingly.

THIS, the 7TH day of April, 1986.

NEAL B. RIGGERS, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4528
Summary Calendar

AARON VENCE, BEVERLY PERKINS,
REV. CHARLES E. WILLIAMS and
DENISE YOUNG,
Plaintiffs-Appellants,

v.

BOLIVAR COUNTY COMMUNITY ACTION
PROGRAM, INC., ET AL.,
Defendants/Appellees.

Appeal from the United States District
Court for the Northern District
of Mississippi
(GC-85-88-NB-0)

(. April 20, 1987)

Before POLITZ, WILLIAMS, and JONES,
Circuit Judges.

Per Curiam:*

This is an action brought by Aaron Vence, appellant, who claims he was terminated by the Bolivar County Community Action Program (BCCAP) in violation of 42 U.S.C. § 1983 and his fifth amendment rights. Pendent state claims for

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

libel and slander were also asserted and an order for a writ of mandamus pursuant to 5 U.S.C. § 702 was sought by Vence, and another appellant, Denise Young. Finding no issues of material fact and no enforceable rights in appellant's claims, we affirm the district court's entry of summary judgment.

We review the facts in the light most favorable to the non-movant. The Bolivar County Community Action Program (BCCAP) is a private, non-profit corporation chartered under the laws of the State of Mississippi. After Vence had been employed by BCCAP for approximately eighteen years, he was notified in writing by Billy Joe McCain, Director of the Bolivar County Head Start Program, that he was being terminated

from his employment, effective September 30, 1983, for submitting false travel vouchers. The decision to terminate Vence was appealed to and voted upon by the BCCAP Policy Council which voted for reinstatement. Thereafter, the BCCAP Board of Directors reviewed the Policy Council's decision and, contrary to the Council's decision, voted to terminate Vence's employment.

The disagreement between the Policy Council and Board of Directors led the Executive Director of BCCAP, Richard Gernert, to contact John Jordan, a regional director with the Department of Health and Human Services (HHS), to obtain procedural advice as to the best way to bring the disagreement between the Policy Council and

Board of Directors to the attention of HHS for purposes of resolution. Jordan advised Gernert that termination of Vence would be the appropriate way to bring the matter to HHS's attention. Soon thereafter Vence was informed by Gernert that his position with BCCAP had been terminated.

Because the termination was effected over the Policy Council's disapproval, Jordan wrote to Kirk Povall, Chairman of the BCCAP Board of Directors, informing Povall that Vence's termination violated 45 C.F.R. § 1304 (App. B). In spite of this letter, Povall refused to reinstate Vence, thus forcing Jordan to notify BCCAP that federal funds would be terminated until an informal show

cause hearing could be held. 1/

At the informal show cause hearing, without addressing the merits of Vence's termination, the hearing officer determined that BCCAP had violated HHS regulations and recommended that a joint meeting be held between the BCCAP Board and Policy Council in order to resolve the dispute. 2/ Pursuant to the

1/ Despite the threat, it does not appear that federal funds were ever actually terminated.

2/ HHS policy dictates that the Head Start Board and Policy Council must agree on certain decisions, 45 C.F.R. Part 1304 (Appendix B, Charts B & C), including personnel matters, and if they do not, a joint meeting of the two bodies is specifically recommended as a means to resolve their differences.

recommendation, Jordan remanded the dispute back to BCCAP. The Policy Council met again, rescinded its prior decision to reinstate Vence, and voted to terminate Vence's employment. The dispute having been resolved, Jordan wrote Povall advising that HHS regulations had been satisfied.

Upon his failure to gain reinstatement, Vence filed suit. Eventually, the district court granted summary judgment in favor of the defendants.

I. FEDERAL ACTION

Vence concentrates on the allegations of federal action involved in the decision to terminate his employment. Vence claims that Jordan's telephone discussion with Gernert, wherein Jordan advised

Gernert of the procedures to follow in order to bring the disagreement over Vence's termination to the attention of HHS, constituted federal action bringing his claim within the ambit of the fifth amendment. Moreover, Vence maintains that Jordan's threat to terminate federal funding to BCCAP, Jordan's role in instigating the show-cause hearing, and Jordan's remand of the dispute back to BCCAP for resolution resulted in federal action.

In other words, it is Vence's position that Jordan's intervention resulted in his termination despite the Policy Council's disapproval. We disagree. The initial decision to terminate Vence had been made prior to Gernert's telephone

discussion with Jordan. Jordan neither encouraged nor coerced Gernert or BCCAP to terminate Vence. At most, Jordan's conversation constituted acquiescence in the decision already made by employees (McCain and Gernert) of a private corporation (BCCAP) in a purely private dispute. The Supreme Court has held that acquiescence by a state entity does not convert a private action into that of the state in § 1983 actions. Flagg Brother, Inc. v. Brooks, 436 U.S. 149, 164, 98 S.Ct. 1729, 1737, 56 L.Ed.2d 185 (1978). State, or by analogy, federal action will only be implicated for private actions when the state or federal government by its laws or conduct has compelled, coerced or, at the

very least, significantly encouraged the act. Id. There is nothing in the record to indicate that Jordan substantially influenced, encouraged, or compelled BCCAP's decision to terminate Vence. In fact, Jordan's letter to Povall threatening to terminate federal funding unless Vence was reinstated, counters any argument that Jordan encouraged the termination of Vence. The fact that Jordan initiated the show-cause hearing and followed the hearing officer's recommendation that the dispute be remanded to the Policy Council and BCCAP Board for a joint meeting did not constitute federal action for the purpose of encouraging or influencing Vence's termination. This conduct occurred as a result of BCCAP's failure to

comply with HHS regulations by firing Vence without mutual concurrence of its Board and Policy Council. See supra note 2. The purpose of the hearing was to reconcile BCCAP's actions with the regulations not to instruct BCCAP how to conclude its personnel decision. The hearing officer stated that he "does not believe it is within his province to decide the merits of the dispute between the Board and Mr. Vence." He recommended a remand for reconsideration by the Board and Policy Council in the hope that an agreement between them would avert the need for federal intervention. This hope was fulfilled. The potential collateral effect of BCCAP's firing of Vence on its right

to receive federal funding does not cause this private employment action to mutate into federal action. 3/

II. MANDAMUS

In addition to the fifth and fourteenth amendment claims, the appellants sought a writ of mandamus under 5 U.S.C. §702, the

3/ Vence also claims that HHS's failure to follow the procedures outlined in 45 C.F.R. 1303.35 for show-cause hearings, violated his due process rights. His brief acknowledges, however, that the show-cause hearing was "informal", and the full panoply of procedures was not necessary.

Administrative Procedure Act, to enforce the original Policy Council decision to reinstate Vence. Appellants argue entitlement to a writ of mandamus since they believe HHS had a duty to enforce the local Standard Operating Procedure No. 18, §II.7 which finalizes Policy Council decisions unless appealed to the BCCAP board.4/ We agree with the district court's disposition of this complaint. HHS followed its own operating instructions by recommending a meeting between the Board and

4/ Standard Operating Procedure No. 18, § II.7 provides: "Unless appealed to the CCA Board on procedural due process ground, the decision of the Policy Council is the final step on the program level."

Policy Council.5/ Moreover, HHS has not the power or the duty to direct daily operations of community action programs and has no authority over the program's personnel matters. Neither does HHS have a duty to enforce local rules implemented by the private community action programs. HHS procedures were followed; mandamus is inappropriate as against HHS.

5/ The HHS "Board of Directors' Relationship to Head Start Council" Instruction requires, when there is a failure by the board and policy council to concur on an issue, that board and council representatives "meet jointly to resolve the matters confronting the two bodies."

III. DISCOVERY

Appellants complain that at the time summary judgment for the defendants was granted, they had not been able to complete their discovery. Hence, according to appellants, the district court abused its discretion by refusing them additional discovery time.

Fourteen months elapsed between the time appellants filed this lawsuit and the district court's ruling on the summary judgment motion. Furthermore, approximately six months passed from the filing of the summary judgment motion in which appellants could complete the discovery needed to contest that motion. Appellants therefore had ample opportunity to conduct discovery. We find no

abuse of discretion by the district court's refusal to extend the time for discovery.

IV. TAXATION OF DEPOSITION COSTS

Finally, appellants challenge the district court's decision ordering them to pay the cost for Vence's disposition. 28 U.S.C. § 1920(2) permits taxation of costs for "fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; . . . ." Appellants maintain that the district court abused its discretion in taxing to them the cost of this deposition since it was never made a part of the record and not used in any "substantial sense" for the defendants' motion for summary

judgment. The district court found that Vence's deposition was reasonably necessary for trial preparation. Moreover, in light of the fact that depositions are not typically filed under the rules of that court, the district court found it proper to assess the costs of the deposition to Vence. From this, we find no error or abuse of discretion.

We are also unable to justify a remand with directions that costs of deposition copies be segregated from the total cost of the deposition. Vence has failed to submit any evidence that copies of the deposition were made or the cost of those alleged copies. Consequently, appellants have failed again to make a showing of any abuse of discretion.

For the foregoing reasons, we find that the plaintiffs have failed to show any genuine issues of material fact entitling them to relief under 42 U.S.C. § 1983, the fifth amendment, or under 5 U.S.C. § 702.6/ Vence's state-law-based

6/ Although urged in his original complaint, Vence has failed on appeal to address and brief any claims he may have with respect to alleged civil rights violations under 42 U.S.C. § 1983. His vague, nonspecific references to § 1983 claims throughout his brief do not constitute "briefing." We therefore deem this claim to have been abandoned or waived. Franceski v. Plaquemines Parish School Bd., 772 F.2d 197, 199 n.1 (5th Cir. 1985). In any event, it

is without merit. The closest Vence came to articulating such an issue was his allegation that some of the BCCAP Board appointments had been made by state officials or entities. Such appointments however, without more, are a far cry from one who is typically classified as a "state-actor." Moreover, Vence completely failed to show that his civil rights had been violated as a result of some state rule of conduct. Lugar v. Edmundson Oil Co , 457 U.S. 922, 937, 102 S.Ct. 2744, 2753-55, 73 L.Ed.2d 482 (1982).

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claims, we assume, may proceed in state court. The district court's judgment is therefore AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

AARON VENCE, ET AL., Plaintiffs	)	
V.	)	NO. GC85-88-NB-O
BOLIVAR COUNTY COMMUNITY ACTION PROGRAM, INC., ET AL., Defendants	)	

ORDER

Purusant to a memorandum opinion this day issued, it is hereby ORDERED:

That the motion of defendants John Jordan and Margaret Heckler to dismiss or for summary judgment be and hereby is GRANTED;

That the remaining defendants' motion for summary judgment be and hereby is GRANTED; and

That the above styled and numbered cause be and hereby is

DISMISSED.

THIS, the 7th day of April, 1986.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-4528
Summary Calendar

D.C. Docket No. GC-85-88-NB-O

AARON VENCE, BEVERLY PERKINS,
REV. CHARLES E. WILLIAMS and
DENISE YOUNG,

Plaintiffs-Appellants,

versus

BOLIVAR COUNTY COMMUNITY
ACTION PROGRAM, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District
Court for the Northern District
of Mississippi

Before POLITZ, WILLIAMS, and JONES,
Circuit Judges.

J U D G M E N T

This cause came on to be heard

on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

April 20, 1987

ISSUED AS MANDATE: May 12, 1987

RIGHTS OF PERSONS

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without

just compensation.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant

in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.

§ 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. Added Pub.L. 87-748, § 1(a), Oct. 5, 1962, 76 Stat. 744.

§ 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily

obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and upon allowance, included in the judgment or decree. June 25, 1948, c. 646, 62 Stat. 955.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the

United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

§ 9833. Financial assistance for Head Start programs

The Secretary may, upon application by an agency which is eligible

for designation as a Head Start agency pursuant to section 9836 of this title, provide financial assistance to such agency for the planning, conduct, administration, and evaluation of a Head Start program focused primarily upon children from low-income families who have not reached the age of compulsory school attendance which (1) will provide such comprehensive health, nutritional, educational, social, and other services as will aid the children to attain their full potential; and (2) will provide for direct participation of the parents of such children in the development, conduct and overall program direction at the local level.

(Pub.L. 97-35, Title VI, § 638,

Aug. 13, 1981, 95 Stat. 499.)

§ 9837. Power and functions of Head Start agencies

(a) Receipt, administration, and transfer of funds; sponsorship of projects; delegation of authority, etc.

In order to be designated as a Head Start agency under this subchapter, an agency must have authority under its charter or applicable law to receive and administer funds under this subchapter, funds and contributions from private or local public sources which may be used in support of a Head Start program, and funds under any Federal or State assistance program pursuant to which a public or private nonprofit agency (as the case may be)

organized in accordance with this subchapter, could act as grantee, contractor, or sponsor of projects appropriate for inclusion in a Head Start program. Such an agency must also be empowered to transfer funds so received, and to delegate powers to other agencies, subject to the powers of its governing board and its overall program responsibilities. The power to transfer funds and delegate powers must include the power to make transfers and delegations covering component projects in all cases where this will contribute to efficiency and effectiveness or otherwise further program objectives.

(b) Participation of parents in decision-making, implementation, etc.

In order to be so designated, a Head Start agency must also (1) establish effective procedures by which parents and area residents concerned will be enabled to directly participate in decisions that influence the character of programs affecting their interests; (2) provide for their regular participation in the implementation of such programs; (3) provide technical and other support needed to enable parents and area residents to secure on their own behalf available assistance from public and private sources; and (4) establish procedures to seek reimbursement, to the extent feasible, from other agencies for services for which any such other agency is responsible, which

are provided to a Head Start participant by the Head Start agency.

(c) Coordination with other agencies

The head of each Head Start agency shall coordinate with other programs serving the children in the Head Start agency to carry out the provisions of this subsection[1].

(Pub.L. 97-35, Title VI, § 642, Aug. 13, 1981, 95 Stat. 502.)

[1]So in original. Probably should be "subchapter".